In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR,
AND
ALAN C. McMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY & HEALTH
ADMINISTRATION,
Appellants,

vs.

ROADWAY EXPRESS, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pendng a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

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STATEMENT OF THE CASE

1. *Nature of Case.* This is a direct appeal taken by the Secretary of Labor from an order of the United States District Court of the Northern District of Georgia declaring Section 405 of the Surface Transportation Assistance Act of 1982 ["Section 405"], 49 U.S.C. §2305(c)(2)(A), to be unconstitutional to the extent that it empowers the Secretary of Labor to order reinstatement of a discharged employee prior to conducting an evidentiary

hearing which comports with the minimum requirements of due process. The district court further declared that an order of the Secretary issued pursuant to Section 405 is violative of the requirements of procedural due process to the extent that it requires appellee, Roadway Express, Inc. ("Roadway"), temporarily to reinstate a terminated employee prior to an evidentiary hearing. Accordingly, the district court enjoined the Secretary from further issuance of preliminary orders of reinstatement pursuant to Section 405 without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process.

2. *Nature of the Constitutional Challenge.* On procedural due process grounds, Roadway challenges the issuance of an order of preliminary reinstatement which takes effect before the employer is, at a minimum, given a prior opportunity to present its side of the case in an adversarial hearing. Roadway contends that during the investigative stage of a Section 405 complaint, it is entitled to a hearing when the investigating authority initially concludes that the untested evidence gathered is sufficient to suggest reasonable cause to believe that a violation has occurred. At that time, in order to meet the requirements of procedural due process, the employer should be apprised of the specific facts which are alleged to constitute the Section 405 violation and should be provided an opportunity to test the reliability of the evidence offered against it, including a chance to confront and cross-examine the witnesses on whom the Secretary relies. In connection with such an adversarial hearing Roadway claims the right secured by the Fifth Amendment to shape its defense and to present its side of the case in the form of offering evidence, testimony and arguments specifically responsive to the evidence which the Secretary considers, in its un-

challenged state, to be sufficient to establish reasonable cause to believe that Section 405 has been violated.[1]

3. *The Facts and Procedural History of the Case.* On November 22, 1983, Jerry W. Hufstetler, an over-the-road truck driver based at Roadway's Lake Park, Georgia terminal was terminated by the manager to whom he reported, Archie Jenkins, for intentionally disabling his vehicle while at the St. Petersburg terminal in order to create overtime/delay pay[2]—an act of dishonesty subjecting him to immediate discharge under the terms of the National Master Freight Agreement, Southern Area Conference ("NMFA"), the labor agreement governing the terms and conditions of his employment. J.A. 86-87.

Hufstetler filed a grievance under his labor agreement. J.A. 33-34. The agreement provides that the employer may only discharge for just cause and further that an employee may not be required to operate unsafe equipment or operate equipment under circumstances which would violate any statute or regulation. J.A. 36-39. The grievance was submitted to the Multi-State Grievance Committee comprised of three management representatives

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1. Following the entry of findings of reasonable cause to believe that a violation has occurred, the employer is entitled to a full *de novo* hearing under Administrative Procedure Act ("APA") standards. 49 U.S.C. App. §2305(c)(2)(A). Roadway does not argue that an order of preliminary reinstatement may not be entered before that hearing or that a full evidentiary hearing of that nature must first be held. Nor did the federal district court so rule. It stated, "The court notes that a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather, it is sufficient that an employer be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses." J.S. App. 8a-9a.

2. Through the first ten periods (300 days) of 1983 Hufstetler had collected $1,292.38 for 98.28 breakdown hours compared to the next closest employee who had $289.00 in breakdown pay. J.A. 74.

from carriers other than the affected employer and three Teamster officers who are not affiliated with the grievant's local. The NMFA provides that a majority decision of the Grievance Committee is final and binding on the parties. J.A. 80-83.

At the grievance hearing, the Company put on its evidence and made arguments; Hufstetler's representative, a business agent from his local union, put on evidence for him and made arguments; and Hufstetler testified and made arguments in his own behalf. Hufstetler and his union representative contended that Hufstetler did not commit the charged act of dishonesty and that the discharge was the result of retaliation by the St. Petersburg terminal manager, Mike Titus. Hufstetler claimed the previous friction between them was related to a prior equipment breakdown he had had while at the St. Petersburg terminal. J.A. 40-76. The Committee deadlocked and, under the terms of the contract, the case was then referred to the second step in the contractual grievance resolution process, the Area Committee. J.A. 80-89.

That committee is also made up of three managers from carriers other than Roadway and three Teamster officers unaffiliated with the grievant's local. J.A. 80-83. The Area panel made the transcript of the Multi-State Grievance Committee hearing a part of its record, and Hufstetler's business agent introduced additional evidence. On January 30, 1984, the Committee sustained the discharge (J.A. 77, 92), rejecting Hufstetler's claim that his discharge was not for "just cause" and thereby finding, as a matter of fact, that he had committed the charged act of dishonesty and had not been discharged for safety-related activity. By contract, the decision of the Area Committee is final and binding on the parties. J.A. 80-83.

One week later, on February 7, 1984, Hufstetler filed a complaint with the Department of Labor ("DOL") and claimed that he had been discharged because "[t]he St. Pete terminal manager was upset when [Hufstetler] requested costly repairs needed for truck driving safety, and was later terminated on a pretext of 'dishonesty'." J.A. 13. The DOL notified Roadway that Hufstetler had filed a complaint with the DOL office alleging a violation of Section 405 and solicited "a full and complete written account of the facts and a statement of [Roadway's] position in respect to the allegation that [Roadway had] discriminated against [Hufstetler] in violation of the Act." OSHA INSTRUCTION DIS .4A August 26, 1985, Directorate of Field Operations, Revised Section 11(c) Investigator Manual ("OSHA Investigator Manual"), Appendix A-5.[3] In response, Roadway submitted a written position statement with the supporting statements, transcripts and award from the Grievance Committee hearings.

During the course of the investigation, when the investigator stated that he intended to recommend the issuance of a "cause" finding and a preliminary order of reinstatement, counsel for Roadway asked DOL for the statements and evidence on which the investigator was relying. They were denied on the grounds of informant's privilege. J.A. 93. A meeting was held and, at that meeting, the Secretary's representatives did not disclose or discuss the statements on which the investigator was relying in forming his opinion that the Act had been violated nor were the names of the individuals supplying the evidence disclosed. J.A. 7, 14-15, 26, 93. Counsel to Roadway unsuccessfully attempted to persuade the Secretary's representa-

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3. For convenience, this publication was separately submitted by the Secretary to the Court. *See* Appellant's Brief at 5-6, n.3.

tives that it was inappropriate and contrary to national labor policy recognized in analogous DOL regulations to order immediate reinstatement and thus upset a final and binding labor contract arbitration award based on an adversarial proceeding, without first conducting an adversarial hearing themselves.[4] The Secretary also rejected Roadway's argument that Section 405 was constitutionally inadequate to the extent that it precluded a pre-deprivation adversarial hearing. J.A. 7, 14-15, 26.

On January 21, 1985, 349 days after Hufstetler's February 7, 1984 complaint to the DOL, the Secretary of Labor, through his Regional Administrator of OSHA, issued an order of immediate reinstatement.[5] J.A. 16-19.

Within 30 days of the Secretary's issuance of his reasonable cause finding and order of preliminary reinstatement, Roadway protested the entry of a final order, filed Objections to the Secretary's Findings and Preliminary Order, and requested a hearing on the record. J.A. 20-23.

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4. *See* 29 C.F.R. §1977.18. The Secretary has yet to issue regulations under Section 405. However, the substance of OSHA 11(c), 29 U.S.C. §660(c), and of Section 405, 49 U.S.C. App. §2305(a)(b), is the same. Common Field Operations Directives are utilized in the enforcement of these two statutes by DOL. *See* OSHA Investigator Manual. The Regulations issued under OSHA 11(c), 29 C.F.R. §1977.1-.23, while not binding the DOL in Section 405 cases, are a strong indication that the Secretary recognizes the value of labor arbitration proceedings in the resolution of factually parallel charges under the Act.

5. Section 405(c)(2)(A) provides that within 60 days of receipt of a complaint the Secretary shall conduct an investigation, make a determination, and notify the parties of his findings. 49 U.S.C. App. §2305(c)(2)(A). The Secretary treats the 60-day period as "directory." OSHA Investigator Manual at IX-7. A survey of 45 investigatory findings, in the public records of the Secretary and randomly known to Roadway's counsel, shows that only three were completed within 60 days. The range was from 50 days to 619 days with the average investigation being completed in 199 days. *See* Summary in Appendix A to this brief.

Following a hearing held during March 26-29, 1985, the presiding administrative law judge issued his initial Recommended Decision and Order on October 30, 1985.[6]

4. *The Secretary's Use of the OSHA Investigator Manual.* The Secretary of Labor contends that the Section 405 investigative procedures set out in the OSHA Investigator Manual and utilized to make decisions of preliminary reinstatement are sufficient to satisfy due process requirements. The Manual assigns to a regional investigator the responsibility for investigating complaints, resolving questions of credibility and reliability of evidence, and making recommendations to his supervisory investigator, who effectively recommends a decision and drafts the Secretary's Preliminary Findings and Order. The OSHA Regional Administrator signs and issues the findings and order on behalf of the Secretary of Labor. OSHA Investigator Manual, V-1 to VI-4, IX-1 to IX-7.

The Manual procedures are not the product of rulemaking and do not constitute formal regulations in implementation of Section 405. They do not emerge from the

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6. The statute states that the final order of the Secretary of Labor will be issued within 120 days of the conclusion of the hearing. 49 U.S.C. App. §2305(c)(2)(A). The Secretary, however, has interpreted the statute to require the issuance of a final order within 120 days after the issuance of a recommended decision by the ALJ. *See* Appellant's Brief at 6, n.4.

The Secretary issued a final order in the Hufstetler case on August 21, 1986, after the Secretary rejected and remanded the ALJ's first Recommended Decision and Order (J.S. App. 29a-43a) following receipt of Roadway's exceptions. *See* Motion to Affirm n. 4 and App. A. If Roadway had accepted the January 21, 1984, Order of preliminary reinstatement without challenging its constitutionality, and if the Secretary's August 21, 1986 final order had been favorable to the Company, Roadway would have been unjustifiably required to retain a previously discharged employee for a period of 19 months. The substance of the Secretary's final order, irrelevant to this inquiry, will be the subject of an appeal to the Eleventh Circuit Court of Appeals pursuant to 49 U.S.C. App. §2305(d).

beneficial rulemaking experiences of notice, comment, and hearing opportunity for the affected employer or employee regulatees. Moreover, they operate during the still formative period of Section 405. They are not associated with any significant contemporaneous construction by the DOL.

SUMMARY OF ARGUMENT

Section 405 of the Surface Transportation Assistance Act is unconstitutional because it mandates an order of preliminary reinstatement of a discharged employee based only on an investigative finding. The Act makes no provision for any adversarial hearing before the entry of the order which deprives the employer of the contractual right to discharge for cause.

This is not, of course, the first case in which this Court has been asked to address the right to a hearing before a preliminary deprivation of property or liberty. The Court has routinely recognized that

> [a]n essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank*, ... "[T]he root requirement" of the Due Process Clause [is] "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. *Boddie v. Connecticut* [cite omitted] (emphasis in original); see *Bell v. Burson* [cite omitted]. This principle requires "some kind of a hearing . . . ." *Board of Regents v. Roth* [cite omitted]; *Perry v. Sinderman* [cite omitted] . . . . [T]his rule has been settled for some time now. *Davis v. Scherer* [cite omitted.]

Cleveland Board of Education v. Loudermill, 470 U.S. ....., 105 S.Ct. 1487, 1493 (1985).

The Secretary does not disagree with this premise:

> We certainly do not dispute that an employer should be afforded an opportunity to be heard before the employer may be required to reinstate an employee on a temporary basis pending further review of the matter.

J.S. at 12. Nor does the Secretary dispute that Roadway's right to discharge an employee for cause constitutes a property interest entitled to the protection of the Fifth Amendment. J.S. at 11, Appellant's Brief at 16, 26.

Similarly, Roadway shares the government's interest in safety on the highways and supports the intent and purpose of the Act to encourage employees to report unsafe equipment or conditions. However, Roadway disagrees with the Secretary's contention that highway safety and encouragement of safety reporting will be adversely impacted by affording the employer a due process adversarial hearing during the investigative phase of a Section 405 complaint.

Roadway notes that nothing in the pertinent language of Section 405 precludes the Secretary from conducting some kind of an adversarial hearing prior to making findings of reasonable cause to believe that the Act has been violated and entering an order of reinstatement. Thus, the Court may construe Section 405 to require a prior evidentiary hearing opportunity as part of the investigation procedure directed by the statute. This could be accomplished by rejecting the Secretary's use of the OSHA Investigator Manual's unilateral investigation procedures to make his reinstatement decision. Such analysis avoids declaring the statute unconstitutional. *See Califano v. Yamasaki*, 442 U.S. 682 (1979).

To the extent that Section 405 calls for an order of preliminary reinstatement based on a unilateral investi-

gation and decision-making procedure, and is read to exclude any adversarial hearing opportunity during the investigation procedure, it is unconstitutional. An analysis of a Section 405 reinstatement claim under each of the criteria in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (the private interest being affected by the governmental action; the risk of erroneous deprivation; and the nature of the governmental interest) shows that the statute is constitutionally flawed.

The Secretary's order to reinstate a discharged employee without a minimal prior adversary hearing deprives employers of a substantial property right. Under the statute and the Secretary's procedure, the duration of preliminary reinstatement is indeterminate. The consequences to efficiency, discipline in the workplace, and the morale of the employer and fellow employees are significantly impacted. Roadway, a party to a collective bargaining agreement containing a provision for final and binding resolution of contract disputes, loses the benefit of its bargain when the arbitration result in a case factually parallel to a corresponding Section 405 complaint is upset by an order of preliminary reinstatement. Moreover, the employees below the temporarily reinstated employee in seniority are financially impacted with no remedy if the Secretary has made an error. The private interest of the employer is substantial.

In the absence of a prior evidentiary hearing, the cumulative risk of an erroneous deprivation under Section 405 is particularly high because 1) the factual issue of retaliatory motive is inherently subjective, 2) the government investigation combines the functions of prosecutor and decision-maker, and 3) the investigative proceeding excludes the opportunity for the respondent to know the

specific evidence submitted against it, to controvert it, and to mold its defense to the evidence actually being considered. Without such an evidentiary hearing, the Section 405 decision-making process which results in the deprivation of the employer's private interest is unconstitutional.

Significantly, the governmental interest in the statutory purpose of encouraging the reporting of unsafe equipment or practices, would not be adversely impacted by an evidentiary hearing during a Section 405 investigation. Both the statute and the Secretary's practice under it recognize that a Section 405 complainant will not be reinstated until the completion of the investigation required by the Act and entry of an order by the Secretary. Thus, affording the employer a due process hearing in the investigatory interim will have no impact on the statutory scheme that seeks to avoid only extraordinary delays in reinstatement. Moreover, under other "whistleblower" statutes administered by the DOL there are procedures already in place to conduct and complete an investigation and an evidentiary hearing within the time frame contemplated by Section 405 and more rapidly than under current Section 405 practice.

This Court has addressed the question of what kind of pre-deprivation procedures are necessary in a number of contexts. In cases of parole revocation,[7] prison discipline,[8] public sector employment rights,[9] student discipline,[10] loss

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7. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

9. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985).

10. *Carey v. Piphus*, 435 U.S. 247 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975).

of public welfare[11] and social security benefits,[12] replevin or garnishment of property with judicial assistance,[13] and the revocation of licenses,[14] the Court has recognized that due process requires "some kind of a hearing" before a temporary or preliminary deprivation of property may take place. In this case, "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." [cites omitted] *Goldberg v. Kelly*, 397 U.S. at 269.

The district court correctly concluded that Section 405 cases by their nature involve the resolution of disputed issues of fact and credibility. The attendant risk of erroneous deprivation demands that the employer first be given the opportunity to defend itself in an evidentiary hearing which affords it at least minimium due process protections. Those protections include the right to know the evidence being considered; the opportunity to shape a defense in response to the claimed facts; and the right to challenge the facts and their sources for reliability, completeness and credibility in an adversarial hearing. The district court declaration that Section 405 is unconstitutional to the extent that it precludes these protections should be sustained.

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11. *Goldberg v. Kelly*, 397 U.S. 254 (1970)

12. *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

13. *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

14. *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977).

ARGUMENT

I. The Court May Construe Section 405 To Require A Prior Evidentiary Opportunity Within The Contemplated Investigation; Reject The Secretary's Adaptation Of The OSHA Investigator Manual; And Thereby Avoid Declaring The Statute Unconstitutional.

Nothing in the pertinent language of Section 405 precludes the Secretary from conducting an adversarial hearing prior to the Secretary's reasonable cause finding and order of preliminary reinstatement:

> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief [of, *inter alia*, reinstatement with pay]. Thereafter, [a party] may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted.

49 U.S.C. App. §2305(c)(2)(A).

As the district court concluded, the provision operates unconstitutionally "*to the extent* that it requires the [employer] to temporarily reinstate the [terminated employee] prior to an evidentiary hearing." (emphasis supplied).

However, as a constitutional cure, "a full evidentiary hearing prior to reinstatement is not required." Rather, "it is sufficient that an employer be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" before he is ordered to reinstate the complaining employee. J.S. App. 8a-9a.

Consequently, the Court may resolve the present controversy by means of statutory construction requiring a reasonable evidentiary opportunity for the employer before the Secretary's decision of reinstatement. This resolution comports with close-fitting precedent, *Califano v. Yamasaki*, 442 U.S. at 696-697 (1979); preserves the essential ends and means of the statute; and promotes reliable fact finding of the contentious and generic question of employer retaliation lodged at the center of a typical Section 405 dispute.

In *Yamasaki*, the Court read a silent, facially neutral statutory provision to afford an oral hearing opportunity to Social Security recipients who were facing government recoupment of overpayments unless they could show absence of fault in their receipt of the over payment and hardship from the recovery. The relevant hearing-neutral language, 42 U.S.C. §404(b), provided:

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

However, the Secretary does not read Section 405 as allowing a construction permitting an adversarial hearing during the investigation. Therefore, the constitutionality of the statute itself must be analyzed.

In Section 405 cases, the Secretary must resolve "questions of credibility and reliability of evidence" before entering an order of preliminary reinstatement. OSHA Investigator Manual, at VI-3. Questions of fault, motive, intent, reasonable belief and other similar variables are central to any determination by the Secretary whether there is reasonable cause to believe that the Act has been violated. Thus, some kind of an adversarial hearing is necessary before a deprivation order may issue. Throughout its deprivation/due process cases, the Court has recognized that such factual questions must be resolved by other than a unilateral, non-adversarial process. *See Califano v. Yamasaki*, 442 U.S. 682 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *cf. Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985).

The Court has developed three criteria for evaluation of the constitutionality of a governmental taking of a private interest prior to a hearing. These criteria emerged from *Mathews v. Eldridge* and have continued as the basis for analysis in subsequent cases, *e.g., Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1494; *Mackey v. Montrym*, 443 U.S. at 10; *Dixon v. Love*, 431 U.S. at 112-13. The factors are:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

A more detailed analysis of the constitutionality of the statute under the light of the *Mathews* criteria follows.

II. The Secretary's Reinstatement Of Discharged Employees Without A Minimal Prior Adversary Hearing Deprives Employers Of A Substantial Property Right.

A. The Reinstatement Duration.

The Secretary concedes the substantial, and therefore constitutionally protected, property interest at stake:

> Appellee had a contractual right to discharge its employees for cause. Although the power of Congress to regulate in this area is very broad, we do not dispute that the appellee's right to discharge constitutes a property interest protected by the Due Process Clause and that the Secretary's order—had it gone into effect—would have deprived appellee of this interest by requiring the reinstatement of an employee previously dischargd by appellee.

Appellant's Brief at 16, footnotes omitted.

Further, the Secretary acknowledges that the affected property interest expands directly with the protraction of the interim reinstatement. (*Id.* at 49, citing accurately *Mackey v. Montrym*, 443 U.S. at 12 and *Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1498):

> Of course, "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."

The government goes on to suggest that Section 405(c) effectively cures the constitutional problem by the requirement of an "expeditiously conducted" post-deprivation hearing. *Id.*

Less obviously, but nonetheless inevitably, the Secretary admits the true magnitude of the duration of the imposed reinstatement as a matter of regular operation of the statute. *Id.* at 49 & n.26; 6 & n.4. Following the entry of an order of preliminary reinstatement, the employer's objections and request for hearing do "not operate to stay [the] reinstatement remedy." 49 U.S.C. App. §2305(c)(2)(A). The statute requires the expeditious hearing to proceed before an administrative law judge, and the ALJ to issue a recommended decision to be reviewed by the Secretary. *Id.* "Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days." *Id.* While the plain language marks the 120-day period from the conclusion of the hearing, the Secretary has interpreted it to begin at the point of the ALJ's rendition of a recommended decision. Motion to Affirm at 15-16; Appellant's Brief at 6, n.4. Thus, the statutory scheme includes an indeterminate interim period during which the ALJ formulates and issues his decision upon the issue of retaliation. Predictably the interim can be substantial. The hearing before the ALJ in this case was scheduled for March 26-29, 1985, sixty-seven (67) days following the issuance of the order of preliminary reinstatement. After the conclusion of post hearing matters, the ALJ submitted a recommended decision and order to the Secretary on October 30, 1985. The Secretary remanded the case to the ALJ and a second recommended decision and order was submitted to the Secretary who, on August 21, 1986, issued

his own final decision and order. The total potential deprivation illustrated in this case was nineteen months.[15]

The nature of the factual questions at issue (employer retaliation for safety hazard "whistleblowing" or "reasonable" apprehension that there is an unsafe condition which presents a bona fide danger of serious injury) and the

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15. The Secretary attempts unconvincingly to palliate the magnitude of the deprivation.

He proposed that "[t]here is no occasion to consider the permissibility of the delay in the present case" because Roadway achieved preliminary injunctive relief from the district court and thereby avoided the deprivation of which it complains. Appellant's Brief at 49. This observation begs the ultimate issue of the case. The constitutionality of a statute does not improve because a plaintiff gained a preliminary injunction against its ostensible unconstitutionality. Nor should those subject to a statute have to resort to relief from the federal district courts if the enactment is invalid.

Further, the Secretary suggests that the time span between the issuance of the reinstatement order and the ALJ's release of his first recommended decision—approximately nine months—falls within limits constitutionally permissible in *Loudermill* and *Mathews*. Appellant's Brief at 49, n.26. This use of *Loudermill* seems mistaken. The Court was examining the separate validity of delay in post-deprivation hearings only *after* it had concluded that some kind of pre-deprivation hearing opportunity was constitutionally necessary. 105 S.Ct. at 1496 and n.12. In *Mathews* the Court countenanced a potential delay of approximately 11 months in the administrative determination of Social Security disability benefit eligibility because, *inter alia*, (1) eligibility was unrelated to financial need and to collateral sources of benefits and (2) a successful applicant received full retroactive payments. 424 U.S. at 340-41. Neither feature is relevant to the coerced employment relationship presently at issue.

Somewhat defensively the Secretary insists that Roadway "has not shown that the length of the delay in this case is typical of Section 405(c) proceedings generally." Appellant's Brief at 30, n.14. However, there is no limit on the period of time within which a hearing must then be held and a recommended ALJ decision entered; and under current practice 120 days can be added to that elastic period of time for the Secretary to issue his final order. *See* Appellant's Brief at 6, n.4. The employer would, presumably, not be free to reinstitute its discharge decision until the Secretary entered a final order that the employer's discharge action was not, in fact, a violation of Section 405.

Secretary's strained application of the 120-day standard belie the "expeditious" character of the subsequent hearing. It is not enough for the DOL to posit that Section 405(c) is self-healing because it includes a clause for a subsequent expeditious hearing. Once the affected party possesses a constitutionally protected property right, the Constitution —and not the related statute—determines the appropriate procedural protection. *See especially Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493; and *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (concurring opinion of Powell, J.) (cases collected).

Those courts ruling thus far upon the quantum of injury suffered by an employer from a reinstatement order coercing an unwanted employment relationship without a prior adversarial evidentiary hearing opportunity have acknowledged the substantiality of the "potential" for the "prolonged retention" of an unsatisfactory employee. *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 704 (6th Cir. 1985), *reh. denied and modified*, 781 F.2d 57 (1986), and decision below, J.S. at 7a.

B. Consequences To Efficiency, Discipline, And Morale Of The Employer And Fellow Employees.

During reinstatement, the employer bears a variety of unwanted consequences.

First, for lack of an adversarial hearing opportunity, the employer has been unable to demonstrate the validity of the grounds of discharge. These may range from dishonesty (intentionally disabling trucks, as alleged here), unsafe behavior, willful damage of company property, unprovoked physical violence, inefficiency, employee friction, the violation of work rules or directives, and the like.

See J.A. 86-88. Reinstatement brings back to the employer the risk of repeated misconduct; the perception of that risk to other employees; and resulting danger to discipline, morale, and harmony among the employer and its workers.

Secondly, the forced reinstatement has immediate tangible consequences. In the present case, the reinstatement of Hufstetler to his prior seniority position would carry with it a chain of seniority position displacements, which in turn dictates such matters as bidding for driving assignments with corresponding pay differentials, as well as other seniority related issues such as layoffs, recalls, and vacation selection. Such seniority displacement would result in layoff of the junior-most driver.[16] J.A. 80-83. Such consequences are intrinsic to the employment relationship, both public and private, and would continue, following pre-hearing reinstatement, for the duration of the Secretary's procedures. The promotion of "employee efficiency and discipline" dictates that an employer

> must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. at 168 (separate concurring opinion of Powell, J.).

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16. *Compare, Mack v. Air Express International*, 471 F. Supp. 1119, 1125 (N.D.Ga. 1979) (An innocent employee displaced by a mistaken preliminary order has no remedy.)

C. Loss Of The Arbitration Provision Of The Collective Bargaining Agreement.

As the district court additionally observed, the employer here suffers the effective loss of a valued bargained-for element of the employment contract—the arbitration process with its regime of procedural fairness for both sides of the employment dispute.

> In this instance, the arbitration panel, after a lengthy hearing, sustained Hufstetler's discharge for an act of dishonesty. The statutory scheme however, required Roadway to reinstate, for possibly a four-month period, an arguably unsatisfactory employee, in violation of its collective bargaining agreement and at the expense of innocent employees. Certainly, Roadway's interests in not doing so are substantial.

J.S. at 7a.

The contractual benefit of final and binding arbitration must enter into the calculation of an employer's property loss for purposes of constitutional analysis. For the employer, the interest is a critical one as recognized by the consistent decisions of this Court and scholarly literature.[17]

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17. In articulating that the national labor policy favors voluntary resolution of labor contract disputes through the negotiated grievance arbitration proceedings in collective bargaining agreements, the Court, in two of the *Steelworkers' Trilogy* cases, specifically recognized the property interest in a final and binding grievance resolution clause in the labor agreement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for . . . .") Similarly, the Court recognized the property interest in final and binding arbitration clauses in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (the parties "should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."). This property interest was again recognized in *Schneider Moving and Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984) (an arbitration clause and the corresponding peaceful resolution of labor disputes is one of the "parties' presumed objectives in pursuing collective bar-

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III. In The Absence Of A Prior Evidentiary Hearing, The Cumulative Risk Of An Erroneous Deprivation Under Section 405 Is Particularly High (A) Because The Factual Issue Of Retaliatory Motivation Is Inherently Subjective; (B) Because The Government Investigator Combines The Functions Of Prosecutor And Decision-Maker; And (C) Because The Investigative Proceeding Excludes The Opportunity For The Respondent To Controvert Specifically The Evidence Submitted Against It. Moreover The Department Of Labor Can Readily Provide A Rudimentary Evidentiary Opportunity Of The Kind Already Furnished By It In Analogous Classes Of Cases.

The second of the *Mathews* factors is an instruction to consider the "risk of an erroneous deprivation of [the] interest through the procedures used, and the probable

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Footnote continued—

gaining"). Further recognition of arbitration as a valuable contractual property interest of the employer can be found in A. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1496-1497 (1959).

The argument of the *amicus* Teamsters for a Democratic Union ("TDU") (TDU *amicus* brief at 10-15) misconceives the significance of contractual grievance-arbitration for purposes of analysis under the criteria of *Mathews v. Eldridge*. It presses the unchallenged point that collectively bargained arbitration cannot supersede public health and welfare legislation such as Section 405. Roadway does not argue otherwise. Our point—unaddressed by the TDU *amicus*—is that the employer's contractual right to final and binding arbitration must enter the *Mathews* balance as a valued element of its total property interest. The employer has bargained and paid for a grievance/arbitration clause containing an adversarial decision-making process which is much more reliable than a unilateral investigator decision-making process. This critical property interest is utterly gutted by the Section 405 non-adversarial procedures. The risk of error inherent in upsetting an adversarially based final arbitration award with an order of reinstatement based only on an investigation is also significant. *See* §III, *infra*.

value, if any, of additional or substitute procedural safeguards." The Secretary contends that under Section 405

> an employee who alleges that he was discharged in violation of Section 405 must be reinstated on a temporary basis, *without a prior evidentiary hearing*, if the Secretary finds reasonable cause to believe that the discharge was *in fact* retaliatory.

Appellant's Brief at 12 (emphasis supplied). The Secretary argues that the Act's pre-order investigation and decision-making process called for in Section 405(c) is a constitutional substitute for a pre-deprivation adversarial hearing since the employer is entitled to secure a full evidentiary hearing following the order of preliminary reinstatement. *Id.* This analysis does not comport with the Court's analyses of the risk-of-error criterion.

A. A Prior Evidentiary Opportunity Is Constitutionally Necessary Because The Factual Issue Of Retaliatory Motivation Is Inherently Subjective And Controversial.

The "root requirement" of the Due Process Clause is "[the] opportunity for a hearing *before* [being] deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original), *cited in Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493.[18] The Secretary argues that the Constitution does

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18. The Court's most recent decisions appear to have settled the constitutional presumption in favor of a prior, rather than a subsequent, hearing opportunity for a party suffering the deprivation of a property interest. *See especially, Cleveland Board of Education v. Loudermill*, 105 S.Ct. at 1493. "This principle requires 'some kind of a hearing' *prior* to the discharge of an employee who has a constitutionally protected property interest in his employment." (Emphasis added, citations omitted). Moreover, "this rule has been settled for some time now." *Id. Accord,*

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not, however, require any kind of an evidentiary hearing and, quoting *Loudermill*, that in "only one case, *Goldberg v. Kelly*, 397 U.S. 254 (1970) [has] the Court required a full adversarial evidentiary hearing prior to adverse governmental action." Appellant's Brief at 23. This view ignores the fact that the Court has never sustained a deprivation of a protected interest without some kind of an adversarial hearing in circumstances of disputed credibility, except in those few limited situations of governmental emergency.[18] In each deprivation case involving disputed facts hinging on the reliability of the evidence and the

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Davis v. Scherer, 468 U.S. 183, 192. n.10 (1984) and *Boddie v. Connecticut*, 401 U.S. at 379. The Court's use of this authority in *Loudermill* suggests that it has eclipsed the dictum of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974), that for purposes of a property interest, the hearing opportunity may usually follow the deprivation.

19. The Court has recognized the government's right in an "emergency situation" to take summary administrative action without a prior hearing. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981). Those situations are limited to seizures "directly necessary to secure an important governmental or general public interest" where there is "a special need for very prompt action" and where the governmental official making the seizure decision has made his determination "under the standards of a narrowly drawn statute, that [the seizure] was necessary and justified in the particular instance." *Fuentes v. Shevin*, 407 U.S. at 91. The types of situations permitting emergency action have included actions to "protect against the economic disaster of a bank failure," "to protect the public from misbranded drugs and contaminated food," and "to meet the needs of a national war effort." *Id.* at 92 (with collected citations).

Emergency seizures have been distinguished from routine preliminary deprivations in *Bell v. Burson*, 402 U.S. at 542; *Goldberg v. Kelly*, 397 U.S. at 263, n.10; and *Hodel*, 452 U.S. at 301. The prehearing preliminary reinstatement provision in Section 405 obviously does not fall into an emergency category of seizures designed to avoid immediate and irreparable injury. The statute itself recognizes this in its suggested 60-day investigation period, a period that is viewed as "directory" by the Secretary. OSHA Investigator Manual at IX-7.

credibility of witnesses, the Court has required an evidentiary hearing before deprivation. *See especially Goldberg v. Kelly*, 397 U.S. at 268 ("effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence orally"); *Bell v. Burson*, 402 U.S. at 542 (state "must provide a forum for the determination" of fault before deprivation); *see also, Wolff v. McDonnell*, 418 U.S. at 557-67 (evidentiary hearing); *Morrissey v. Brewer*, 408 U.S. at 485-87 (evidentiary preliminary hearing); *cf. Califano v. Yamasaki*, 442 U.S. at 696 (a preliminary hearing to "assess the absence of 'fault' and determine whether or not recoupment would be 'against equity and good conscience'" is read into the Act).

By sharp contrast, in those cases in which the Court has held a hearing constitutionally unnecessary prior to an interim deprivation pending a final hearing, the factual predicate for the preliminary deprivation was objective in nature. In *Mathews v. Eldridge*, the factual basis of a preliminary revocation of social security benefits consisted of "routine, standard and unbiased medical reports by physician specialists." 424 U.S. at 344. The issue to be decided before termination of benefits was "a more sharply focused and easily documented decision than [a] determination . . . [on which] a wide variety of information may be deemed relevant, and [on which] issues of witness credibility and veracity often are critical to the decision making process." *Id.* at 343-44. Thus, for this and other reasons to be discussed below, the Court concluded that there was not a significant risk of erroneous deprivation. *See* Subsections B and C of this section at 27, 32, *infra*.

In *Barry v. Barchi*, 443 U.S. 55, the suspension of a race horse trainer's license before an adversary hearing

was sustained because the undisputable finding of drugs in the animal's urine raised a rebuttable presumption that the trainer was culpable or negligent, either of which circumstances was sufficient to support a license suspension. As the burden was on the trainer to prove that he was neither culpable nor negligent, and as he had the pre-suspension opportunity to offer whatever evidence he had to overcome the presumption, the Court found no constitutional need for a pre-suspension adversarial hearing.

In *Mackey v. Montrym*, the pre-hearing suspension of a driver's license for refusing to take a breath-alcohol test passed constitutional muster because the "predicates" for the suspension were "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," thus minimizing the risk of error. 443 U.S. at 13.

The most recent case in this category, *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, also lacked the type of disputed facts which required an adversarial hearing for resolution before interim deprivation. A public sector employee had reported on his application for employment that he had no prior felony convictions. That statement was objectively untrue. The Court held that, under those circumstances, prior to discharge he was constitutionally entitled to be advised of the charge and given a chance to invoke the discretion of the decision-maker, including the right to offer plausible explanations of why the inference of intentional misrepresentation should not be drawn from the objectively misstated fact. Thus, the Court found no need for an adversarial hearing as the type of pre-deprivation opportunity offered gave the person who would suffer the loss an opportunity to explain himself to the satisfaction of the decision-maker.

Id. at 1489-90. The concurring opinion of Justice Brennan made clear that "[f]actual disputes [were] not involved" in *Loudermill*. *Id.* at 1499. On the other hand, inquiries involving fault and motive, as well as a wide variety of disputed facts on which "issues of witness credibility and veracity often are critical to the decisionmaking process," *Mathews*, 424 U.S. at 343-44, are separate and distinct from this line of cases as they, by their very nature, present a significantly greater risk of error in the deprivation decision.

B. A Prior Evidentiary Opportunity Is Constitutionally Necessary Because The Government Investigator Combines The Functions Of Prosecutor And Decision-Maker.

Another defect is inherent in the DOL's Section 405 non-adversarial, investigative decision-making process. The Department of Labor investigator blends the roles of prosecutor and decision-maker. Even if Section 405 cases were of the "objective evidence" character, this infirmity would be substantial. In tandem with the controvertible quality of the findings to be made - retaliatory motive or reasonable employee action - it is decisive. For, when the Court has denied preliminary evidentiary hearings, it has still recognized the right of the individual subject to a deprivation to have "an informed evaluation by a neutral official." *Fuentes v. Shevin*, 407 U.S. at 83. *See also Gibson v. Berryhill*, 411 U.S. 564 (1973) (the same administrative officer may not constitutionally serve as both prosecutor and adjudicator).

These fundamental safeguards disappear from the procedure used by the Secretary of Labor's representatives in making a determination whether there is reasonable

cause to believe that the employer has violated the Act. First, the investigator who makes the determination is operating under the same guidelines and directives utilized to build a case for prosecution under OSHA 11(c). *See* OSHA Investigator Manual, Chapters II-V, IX. OSHA 11(c) does not provide for preliminary reinstatement but calls on the Secretary to conduct an investigation and decide whether to file an action in district court. 29 U.S.C. §660(c)(2). Thus, the investigator wears both the hats of an agent of the prosecutor in building the case; and of an adjudicator by judging the facts he has gathered for credibility and reliability for the determination of "fault."

A review of the manual directives under which the DOL agent operates as both an investigator and decision-maker furnishes an illuminating contrast with the *Mathews* procedure which, in the absence of disputed facts, was found to be a constitutionally adequate substitute for an adversarial hearing. In *Mathews*, after noting that there was no "'spectre of questionable credibility and veracity'" present, the Court turned to an examination of the pre-deprivation procedures used by the agency. 424 U.S. at 344. First, the individual had "full access to all information relied upon by the . . . agency." *Id.* at 345-346. Second, "prior to the cut off of benefits the agency inform[ed] the recipient of its tentative assessment, the reasons therefor, and provid[ed] a summary of the evidence that it consider[ed] most relevant." *Id.* at 346. The recipient was invited "to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions." *Id.* Thus, "as contrasted with [the fact and credibility issues] before the Court in Goldberg," the recipient was able

to "'mold' his argument to respond to the precise issues which the decision-maker regarded as crucial." *Id.*

In direct contrast, the Section 405 investigative/decision-making process takes a prosecutorial approach. In the OSHA Investigator Manual, the investigator is first reminded of his function: "successful litigation of violations" requires a search "for protected activity, knowledge, animus and reprisal." OSHA Investigator Manual at V-3. The investigator is given directions for accomplishing his assigned task. He is instructed to contact the complainant to initially determine whether the complaint "may have merit." *Id.* at V-5. If he so concludes, he is to develop the "complainant's side of the investigation . . . as thoroughly as possible." *Id.* Having completed the development of the complainant's case, he is directed to "contact the respondent, notify the respondent of the substance of the complaint and arrange to meet with the respondent or its counsel to interview the appropriate witnesses." *Id.* The investigator is also instructed to send a letter to respondent simply notifying it that a complaint has been filed and asking for a "full and complete written account of the facts and a statement of . . . position in respect to the allegation. . . ." *Id.* at App. A-5.[20] The investigator is directed to obtain copies of

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20. A written position statement by a Section 405 respondent is not an adequate opportunity to respond. A basic flaw persists because any response will not be shaped to the specifics of the evidence unless the respondent knows those specifics. Moreover, without the identity of the persons making the allegations, and without the capacity to question their knowledge and motives, the veracity, reliability and completeness of the evidence cannot be tested and its value, if any, weighed. The Court in *Goldberg* recognized this fundamental deficiency in written submissions and rejected them as substitutes for a hearing:

> [W]ritten submissions do not afford the flexibility of oral presentations: they do not permit the recipient to mold his

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appropriate respondent records and, if not possible, to attempt to obtain a sufficient description to subpoena them. *Id.* at V-6, 7. After completing respondent's side of the investigation, he is instructed to recontact the complainant and his witnesses "to resolve any discrepancies or counter-allegations resulting from contact with the respondent." *Id.* at V-7. This completes the investigation.

The investigator is then responsible for evaluating the facts, resolving "[q]uestions of credibility and reliability of evidence" and preparing a "detailed discussion of the essential elements of a violation presented, plus a discussion of the *strengths and weaknesses of the case vis-a-vis respondent's possible defense . . . .*" *Id.* at VI-3 (emphasis supplied). He then prepares a recommendation for disposition of the case. *Id.* The investigator's supervisor reviews the recommendation in light of the evidence in the case file, *id.* at IX-6, and makes an effective recommendation to the Regional Administrator by drafting a Finding and Order in a merit case for the Regional Administrator's signature.[21] *Id.* An executed Finding and Order is mailed to the respondent with a letter advising that regardless of whether an objection is filed,

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> argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.

Goldberg v. Kelly, 397 U.S. at 269.

21. The constitutional shortcoming in this review process was also considered in *Goldberg*, 397 U.S. at 269, "[T]he secondhand presentation to the decision-maker . . . has its own deficiencies: since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot be safely left to him."

> any portion of a preliminary order requiring reinstatement shall be effective immediately upon your receipt of the findings and order.[22]

OSHA Investigator Manual, App. F-2.

In sharp relief from the process at work in *Mathews*, the Section 405 investigative process operates with a pronounced prosecutorial orientation. The investigator does not function as an arbiter balancing countervailing bodies of evidence, but more closely as an agent of a prosecutor seeking to build a case.

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22. The Secretary notes at footnote 21 that the record does not indicate whether Appellee was informed of the substance of the evidence supporting the allegations. Appellant's Brief at 40, n.21. It is difficult without the introduction of extraneous, non-record materials to demonstrate to the Court what the Secretary may have considered in making his broad, non-specific "Findings and Preliminary Order." J.S. App. at 20a-23a. Roadway had submitted the unrebutted statements in the arbitration transcript (J.A. 40-77): Terminal Manager Titus saw Hufstetler's truck marker lights on when Hufstetler arrived at the terminal; he saw them go out when Hufstetler was in the truck after being redispatched on the clock; the Teamster who serviced the vehicle before its dispatch corroborated that he saw no lights out and that, if the lights had not been working, he would have noticed it; and a statement from an independent mechanic that a plug in the cab of the truck which would not have vibrated loose had, in his opinion, been intentionally unplugged. In direct contrast, the Preliminary Findings and Order merely recited that Respondent was discharged

> because he allegedly had created a false breakdown, an act of dishonesty . . . . Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.

J.S. App. at 21a.

Following a hearing on the merits, the ALJ issued a Recommended Decision and Order. J.S. 29a-43a. A review of his initial findings may give some indication of the nature of the evidence the complainant may have submitted to the investigator. J.S. 29a-43a. Compare with the evidence complainant submitted to his grievance committee. J.A. 40-77.

C. The Section 405 Investigative Process Improperly Excludes The Opportunity For The Respondent To Controvert Specifically The Evidence Submitted Against It.

In *Mathews* the Court acknowledged an affected party's entitlement "to all information relied upon" and the concomitant right to shape a defense directed to the evidence on which the agency is basing its decision. 424 U.S. at 346.[23] In a Section 405 proceeding, the factual de-

23. The Secretary argues that disclosure of the witness statements "at this early stage of the proceeding presents a very real threat to the integrity of the complaint investigation process." Appellant's Brief at 46. However, this assertion ignores the fact that it is at this stage of the process that the Secretary is resolving fact issues, making credibility and reliability determinations, and deciding whether to issue a reinstatement order. Roadway does not quarrel with the principle of informant confidentiality *until* the evidence from the informant is used in a proceeding which will result in a deprivation of its property interests. Under the Secretary's Section 405 procedures, that is when the investigator is deliberating on the question whether to issue an order of preliminary reinstatement. As the investigation constitutes the deprivation proceeding in current practice, Roadway is entitled to the evidence at that time. Of course, if some type of an adversary hearing were held before a neutral official and before a deprivation order issued, this problem would be remedied. Roadway would hear whatever evidence is being considered against it and could shape its defense and respond.

The "informant privilege" cases tacitly recognize that once the informant's testimony is used in an attempt to deprive another of a Fifth Amendment right, the individual whose interest is threatened has the right to that evidence in order to challenge it. The informant's privilege is conditional. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978); *Nemacolin Mines Corp. v. NLRB*, 467 F.Supp. 521, 524-25 (W.D.Pa. 1979).

This Court recognizes the principle that one being adversely affected by the testimony of another is entitled to know that testimony in order to respond. It has even applied this principle in the particularly difficult factual situations found in prison environments. "We also hold that there must be a written statement by the factfinders as to the evidence relied on and

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termination is intrinsically controversial, yet the respondent has no opportunity to controvert. Most fundamentally, the employer does not learn the specifics of the evidence against it. It responds to the investigator in a state of semi-darkness. It cannot contest those specifics. It has no chance to examine the witnesses in order to test for veracity, opportunity to know the facts offered, completeness, accuracy, faulty memory, context of the alleged retaliatory statements, malice, vindictiveness, a private political agenda,[24] prejudice, and the like. *See Goldberg v. Kelly*, 397 U.S. at 270 *quoting Greene v. McElroy*, 360 U.S. 474, 496-97 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injuries an individual, and

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reasons' for the disciplinary action. *Morrissey*, 408 U.S. at 489 . . . . Without written records, the inmate will be at a severe disadvantage in propounding his own cause or defending himself from others." *Wolff v. McDonnell*, 418 U.S. at 564-65. The Court recognized that limiting the right in certain circumstances to a written statement is a radical departure from requiring the disclosure of all evidence considered as part of the pre-deprivation process as well as a departure from the right to cross-examine. This departure in *Wolff* and *Morrissey* was based on the recognition that in prison "[r]etaliation is more than a theoretical possibility," *id.* at 562, and that cross-examination in a prison setting "may trigger emotions and may scuttle the disciplinary process . . . ." *Id.* at 563. The principle of a right to know evidence, to respond to it and to the witnesses is clear. It is only in some limited prison situations involving grave danger that the Court reluctantly abridged that right, still subject to "further consideration and reflection." *Id.* at 572. Of course, in a Section 405 proceeding, the witnesses are protected by statute from retaliation, 49 U.S.C. §2305(a), and recognize that they lose their informer's privilege when the government uses their testimony.

24. The TDU *amicus* brief made it clear that there is a political enmity between it and the International Brotherhood of Teamsters, the recognized bargaining agent. *See* TDU *amicus* brief at 2, 11-14. This political division understandably has trucking companies often caught in the middle.

the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

See also 5 *Wigmore on Evidence*, §§1367-1368, pp. 32-39 (3d Ed. 1940) cited by the Court in *Greene*, 360 U.S. at 497.

D. The Evidentiary Hearing Opportunity Can Be A Practical And Efficient Process Of A Kind Already Furnished By The Secretary In Analogous Classes Of Cases.

The pre-deprivation hearing need not be a full evidentiary hearing nor need it be the hearing to resolve the final merits of the case. It is only necessary that the hearing provide sufficient safeguards "to prevent unfair and mistaken deprivation of property." *Fuentes v. Shevin*, 407 U.S. at 97. However, "it is axiomatic that the hearing must provide a real test." *Id. Goldberg v. Kelly*, in the context of welfare departments' "very burdensome case loads",[25] limited the pre-termination hearing to a proceed-

25. Section 405 has experienced approximately 25 to 60 merit cases per year. It is not known what percent of the merit cases involved discharges with preliminary reinstatement remedies. *See amici* brief of American Trucking Associations, Inc., *et al.* at 11 and n.8.

ing designed only "to produce an initial determination of the validity of the . . . grounds for [deprivation] in order to protect . . . against [error]" at the preliminary stage. 397 U.S. at 267. To guard against error in an initial determination of the credibility of the facts, the Court required the following: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity to defend by confronting any adverse witnesses"; and, (3) an effective opportunity to defend "by presenting . . . arguments and evidence orally." 397 U.S. at 267-68.

A similar prescription emerged from *Morrissey v. Brewer*, 408 U.S. at 485-87, defining a due process hearing for the determination of probable cause of a parole violation by a respondent. A constitutionally adequate hearing required (1) a "neutral and detached" person as an "independent decisionmaker," *id.* at 486; (2) notice of the allegations; (3) a right to question the persons who have given the adverse information; (4) the right to present a defense; and, (5) the right to a summary or digest record with a decision. *Id.* at 487.

For the Secretary, such hearings present no novel or difficult burdens. Through existing machinery, the Department of Labor presently conducts a number of such proceedings easily adaptable to the Section 405 investigative/decisional process. The Secretary is charged with investigating and enforcing the "whistleblower" provisions of the Safe Drinking Water Act, 42 U.S.C. §300j-9(i); Water Pollution Control Act, 33 U.S.C. §1367; Toxic Substances Control Act, 15 U.S.C. §2622; Clean Air Act, 42 U.S.C. §7622; and the Energy Reorganization Act of 1974, 42 U.S.C.

§5851.[26] The regulations promulgated under these Acts, 29 C.F.R. Part 24, call on the Secretary, on receipt of a complaint, to complete a field investigation within 30 days. *Id.* §24.4(d)(1). On the finding of a violation, the employer is given notice and within five days must request of the Chief Administrative Law Judge, by telegram, a hearing. *Id.* at §24.4(d)(3)(i). Within seven days thereafter, the parties are notified of a time and place for a hearing. *Id.* at §24.5(a). The Administrative Law Judge is to issue his recommendation within 20 days "after the termination of the proceeding at which evidence was submitted." *Id.* at §24.6(a). At this point in the procedures, the entire investigation, adversarial hearing and preliminary findings will be completed. Approximately 62 days will have passed from the filing of the complaint.

Comparison of this model with the Section 405 investigation is revealing. Upon receipt of a Section 405 complaint, a preliminary investigation is conducted to determine whether the complaint "may have merit." OSHA Investigator Manual V-5. This phase involves the gathering, examining and evaluating of a complainant's case evidence. Once the investigator reaches the conclusion that the complaint may be meritorious, he begins the

26. Each of these statutes is similar in substance to the "whistleblower" provision in Section 405. Each, however, is different in that these statutes, themselves, set out the procedures for the expedited issuance of a *final* order of abatement, reinstatement and other relief. They do not provide for preliminary or interim reinstatement. Nonetheless, the relevant parts of the investigation and hearing machinery already in place in the DOL to conduct prompt hearings under these statutes offers the Secretary one feasible method to provide a preliminary hearing as part of a Section 405 investigation. Such a hearing could be held after the investigator initially concludes that there may be reasonable cause to believe that a Section 405 violation has occurred. A hearing held at this point in time would have no adverse impact on Section 405's purpose of providing a speedy, and constitutional, preliminary reinstatement.

second step of the decision-making process. This second step is, in fact, the substitute for an adversary hearing. He notifies the respondent, takes its position and evidence, returns to the complainant to give him an opportunity to shore up his case, resolves credibility, reliability and fact issues, and makes a proposed Findings and an Order. The goal is to complete this process in 60 days, although that period of time is "directory." The second step of the Section 405 investigation could be constitutionally cured with a notice and hearing procedure tailored to meet the demands of a "reasonable cause" determination within the time constraints imposed under 29 C.F.R. §24.4-.6. The government's interest in a rapid resolution of the reinstatement question would not suffer delay, especially in light of both the statutory period to investigate and to enter a prelminary order, and the present lethargy of the investigative process.

In sum, the flaws inherent in the present Section 405 investigation render the risk of error unacceptably and unnecessarily high. Therefore, the Act is unconstitutional.

IV. A Prior Evidentiary Hearing Would Not Frustrate The Government's Objective Of Speedy Reinstatement Or Implicate Additional Administrative And Fiscal Burdens.

A. The Affirmative Purpose Of An Expeditious Preliminary Decision.

Roadway subscribes equally to the highway safety purposes of the Surface Transportation Assistance Act. With the public and the government, it shares a fundamental interest in the safest possible conduct of its business so as to preserve the welfare of its employees, the property of its customers as well as its own, and the safety,

confidence, and respect of the motorists and the citizenry at large. For the same reasons it concurs in the encouragement of valid safety complaints both to the Company and to the Department of Labor, as necessary, and wishes employees to report hazards without fear or inhibition from the prospect of retaliation.[27]

However, we must vigorously dispute the Secretary's insistence that speedy reinstatement of deserving "whistleblowers" requires elimination of any prior evidentiary hearing opportunity and continued adherence to a purely investigative process. As the language and operation of the statute reveal, somewhat strikingly so in this case, a slow and cumbersome investigation may leave the employee in a state of unemployment far longer than an efficient prior adversarial hearing. The Secretary's essential justification for the exclusion of a hearing is a *non sequitur*. The investigative process does not necessarily return the meritorious "whistleblower" to work more quickly than an evidentiary hearing opportunity; nor does it offer him the prospective assurance of such superior speed. This operation of the statute does not demonstrably promote its avowed public purpose.

First, Section 405(c) itself allots the Secretary 60 days from receipt of the complaint for the conduct of the investigation of the charge of retaliation. 49 U.S.C. App. §2305(c)(2)(A). Moreover, the Secretary views the time span as "directory", rather than mandatory, and will exceed it in many instances. OSHA Investigator Manual at IX-7. In this case the investigation lasted 11 months (J.A.

27. The Secretary devotes considerable exposition to general safety objectives, with which we do not quarrel (Appellant's Brief at 30-36), but relatively brief treatment of the premise on which he hinges the case: assuredly speedier reinstatement in the absence of a hearing. *Id.* at 36-38.

79), and a survey of the cases known to counsel shows that investigations have ranged up to 619 days with the sample average being 199 days. *See* Appendix A to this brief. Thus, the Congress by statutory provision and the Secretary by his operation recognize that a period of discharge during an investigation will not significantly detract from the Act's purpose.

Further, the employee in this case used Section 405(c) not as an exigent remedy of first resort, but rather as a backup program after the collective bargaining grievance-and-arbitration process had, with comparative expedition, resulted in a rejection of his retaliation claim within 10 weeks of his discharge (and after a first panel had been deadlocked). All told, the employee spent thirteen months (November 22, 1983 to January 21, 1985) out of work before the Secretary entered his Order of Preliminary Reinstatement. J.S. App. 3a, 20a-23a. If the swift vindication of rights is the linchpin of the Secretary's justification of the hearing void, it goes unsupported by the text and operation of Section 405(c).

Second, the Secretary's claim of inevitable reinstatement delay, and concomitant discouragement of safety complaints on the part of employees, rests upon an assumption unsupported by reasoning or events of the present record. The assumption is plain:

> Requiring the Secretary to afford the employer an evidentiary hearing before ordering the temporary reinstatement of a discharged employee would thwart the accomplishment of Congress's purpose by delaying relief for employees who engage in safety-related activity. Indeed, the employer would be able to make use of the hearing and any possible appeal to delay the reinstatement of the employee. . . . Mandating a prere-

> instatement evidentiary hearing thus would enable employers to continue to retaliate against an employee by prolonging the employee's unemployment.

Appellant's Brief at 37-38. Yet no statutory language or experience indicates any ability of the employer to control the timing and scope of the prior evidentiary hearing. The elements of administrative control would remain entirely with the Secretary. Indeed, the DOL conducts and controls such prior evidentiary hearings in a variety of statutory programs protecting employees against discriminatory treatment and processing their entitlements to reinstatement. *See* 29 C.F.R. Part 24 and discussion at pp. 35-36 *supra*. The Secretary has offered no reason why he could not similarly administer an expeditious pre-reinstatement hearing process, to the benefit of employer and employee alike, under Section 405(c). He has not identified any specific capacity for obstruction of such a process on the part of the employer. The argument of inevitable delay is simply unsubstantiated.

B. The Avoidance Of Undue Fiscal And Administrative Burdens.

A prior evidentiary opportunity would not add appreciably, if at all, to the fiscal or administrative task of the preliminary reinstatement decision.[28] As the district court pointed out, the necessary proceeding need not approach a full blown adjudication: "The court notes that

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28. The Secretary relegates this criterion to a single paragraph premised upon the assumption that employers will universally invoke a hearing and that it must always entail further effort and cost in the aggregate. Appellant's Brief at 38. However, LOL offers no figures to portray Section 405(c) as a massive genre of administrative litigation akin to welfare benefit programs. *See, e.g., Mathews v. Eldridge*, 424 U.S. at 347. Compare the statistics set out in the *amici* brief of the American Trucking Associations, Inc., *et al.* at 11.

a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather it is sufficient that an employee be given, at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses." J.S. App. at 8a-9a.

Indeed a prior adversarial hearing seems more likely to reduce the aggregate fiscal and administrative investment of the Secretary in Section 405(c) proceedings. As described, the DOL pre-reinstatement investigation constitutes a protracted and cumbersome exercise. Appellant's Brief at 39-41 and notes 19-20. The investigator undertakes a lengthy inquiry. Several layers of DOL personnel review the investigative report: the original investigator; a supervisory investigator; a representative of the Office of the Solicitor of Labor; and the Regional Administrator. J.A. 93-94. Not surprisingly, this circuitous course on the average runs over 199 days,[29] especially since the ultimate issues are the inherently subjective questions of motivation [Section 405(a)] or the reasonableness of an employee's apprehension about an unsafe condition. [Section 405(b)]. A focused, controverted hearing could displace weeks or months of investigative efforts. Even with reasonable lead time of several weeks for hearing preparation by each side, the process could not operate more dilatorily than the existing investigative system. An airing of the facts may even promote settlement.

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29. *See* Appendix A to this brief.

V. The Thesis Proposed By The TDU Amicus Brief, That The Secretary's Application For Injunctive Relief In A District Court Should Serve As An Adequate Constitutional Substitute For A Prior Evidentiary Hearing In The Section 405(c) Administrative Process, Is Unsupportable As Both Law And Policy.

We address briefly the novel proposal of the American Teamsters for a Democratic Union (TDU) that under Section 405(c) the employer can achieve an adequate due process hearing opportunity in response to an application by the Secretary to a federal district court for injunctive enforcement relief in lieu of the prior administrative evidentiary hearing opportunity required by the district court here. TDU *amicus* brief at 15-22. For a variety of reasons, this argument lacks support in both law and practice.

As a matter of law, the position rests in part upon an interpretation of Section 405(c) reinstatement orders contradictory to the Secretary's own characterization of them. The Secretary regards them as mandatory and enforceable in accordance with Section 405(e). Recognizing that the compulsory nature of such orders strengthens the claims of the employer to due process during the Secretary's underlying investigation, *id.* at 16, TDU advances an "alternative construction" that the Secretary's reinstatement order comprises a

> prosecutorial decision to initiate a preliminary injunction action under Section 405(e). In that event, it is in the courts that the employer would receive the process that is due." *Id.* at 18-19. "Under this analysis of the statute, the only due process issue would be whether failure to grant employers a full evidentiary hearing in the course of the judicial preliminary injunction proceeding is unconstitutional under the circumstances.

Id.

This hypothesis travels a great distance from the plain language of Section 405(c) and has no doubt come as a surprise to the Secretary.[30] The statute provides that, where he has found reasonable cause to believe that a violation has occurred, he shall issue "a preliminary order providing the relief" of reinstatement among other remedies. Absent a violation of the order, Section 405 makes no mention of any further necessity or occasion for the Secretary to seek injunctive enforcement of the reinstatement order in district courts. Further, it is axiomatic that the interpretation and application of statutes by administrative agencies charged with their enforcement will receive reasonable deference from the courts. *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969); and *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the present instance, both plain text and practical agency application converge against TDU's proposition.

Further, the TDU reasoning springs from the fallacious premise that *any* pre-reinstatement hearing opportunity will defeat the congressional goal of speedy and reliable reemployment for victimized "whistleblowers." TDU *amicus* brief at 18.[31] As discussed above, a prior hearing

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30. Apparently, the Secretary might wonder whether, with an *amicus* like this, he needs an adversary. *See* TDU *amicus* brief at 18:

> We offer an alternative construction of the statute, however, because we do not share the Secretary's confidence that Section 405 can be construed [in the manner advanced by him] and still pass due process muster.

31. TDU posits:

> But if the Secretary must conduct an evidentiary hearing, however informal, in order to satisfy due process standards,

(Continued on following page)

opportunity could and should take place during the period of investigation.[32] A hearing during that period does no harm to the statutory purpose of speedy and just determination and, ironically, may accelerate reinstatement in appropriate cases. We have no textual or legislative history signals that Congress contemplated so different a process as suggested here.[33]

Other practical defects follow the TDU statutory construction. Apart from the legal character of the Secretary's reinstatement order as mandatory rather than precatory, TDU's interpretation of Section 405(c) discourages the norm of obedience by a regulatee to a directive of a duly competent government agency, and substitutes a presumption of preliminary disobedience as a regular avenue to the regulatee's due process entitlement.[34] Regularized disrespect for the Secretary's reinstatement order seems unlikely to have constituted the congressional intent or to comprise a healthy regime of administrative law.

Furthermore, the district court has no statutory authority to receive or evaluate evidence relating to the substantive Section 405 issue or to substitute its judgment on

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Footnote continued—

or if his preliminary order is subject to judicial review under the Administrative Procedure Act - or, indeed, if both a hearing and judicial review were required - the quick and efficacious remedy desired by Congress would be lost.

TDU *amicus* brief at 18.

32. *See* pp. 34-38, *supra*.

33. For a thorough analysis of the legislative history of Section 405 and the congressional intent not to foreclose an adequate hearing opportunity for employers before deprivation *see* ATA *amici* brief at 4-8.

34. Under the TDU scheme, when "the employer thumbs his nose at the Secretary," it gets its day in court as a defendant. TDU *amicus* brief at 17.

the merits for that of the Secretary. Section 405(e) only provides statutory authority for the district court to enforce a reinstatement order issued by the Secretary. The statute directs the Secretary, not the district court, to make the reasonable cause determination and issue the order.

Relatedly, the TDU interpretative scenario imports another corpus of litigation into the federal district courts in the absence of any signs of congressional intent: preliminary injunctive hearings as the regular mode of Section 405(c) reinstatement decisions instead of initial adjudication by DOL followed by judicial review, the scheme visible in the text of the law. 49 U.S.C. App. §2305(d). Moreover, the decisions of the Court throughout the development of prior hearing doctrine since *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), have tested the constitutionality of administrative procedures by the availability to the affected party of a meaningful hearing opportunity within the administrative scheme itself, and not by the general availability to it of a subsequent lawsuit in the courts as an effort to redress the administrative deprivation order.[35]

Finally, of course, the TDU argument was not available to the court below and could not have played any part in its deliberation and decision. Indeed, as mentioned, the TDU rationale contradicts the statutory position taken by the Secretary and submitted by him to the district court as an ingredient of the decision now on review. Un-

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35. Consequently, TDU's discussion of the injunctive relief criteria applied by the district courts in enforcement suits pursued by the National Labor Relations Board under "§10(j)" and "§10(l)" of the National Labor Relations Act is immaterial. 29 U.S.C. §160(j), (l). TDU *amicus* brief at 20-22. The constitutional question at hand is whether the employer receives a meaningful hearing opportunity before the issuance of an order and the commencement of judicial enforcement litigation.

derstandably this circumstance can result from the submission of *amicus* views necessarily for the first time in this Court. However, this particular argument diverges so dramatically from the range of reasoning advanced below that it has deprived the trial court of a realistic opportunity for its consideration.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPELLEE'S APPENDIX A

DOL Case #	Complainants	Date of Filing of Complaint	Date of Secretary's Preliminary Findings and Order	Number Days From Filing Complaint to Preliminary Findings	Result
1. 0-1650-84-503	Lanpher	01/12/84	04/18/84	97	Cause
2. 1-1270-83-01E	Holmes	02/04/83	10/17/83	255	Cause
3. 1-0120-83-1E	Guinen	06/21/83	10/11/83	112	Cause
4. 1-1270-83-02E	Farland	06/21/83	12/20/83	182	No Cause
5. 1-1270-84-501	Bertrand	11/15/83	09/28/84	318	No Cause
6. 2-6010-84-502	Hulslander	10/07/83	04/12/84	188	Cause
7. 3-6600-83-501	Sollenberger	09/15/83	10/22/84	403	No Cause
8. 3-0050-84-501	Bowyer	10/06/83	06/11/84	249	No Cause
9. 3-0050-84-502&6	Gipson	11/01/83	05/29/84	210	No Cause
10. 3-0050-84-505	Stack	03/28/84	06/01/84	65	No Cause
11. 3-0050-84-040&508	Harper	08/13/84	10/22/84	70	No Cause
12. 4-1220-83-01E	Abrams	05/23/83	11/04/83	165	No Cause
13. 4-0280-83-03E	Couch	07/08/83	10/20/83	104	No Cause
14. 4-0520-83-01E	Nix	07/08/83	10/20/83	104	Cause
15. 4-0280-83-091	Garrett	08/04/83	12/08/83	96	Cause
16. 4-3750-83-05E	Williams	09/23/83	05/22/84	242	No Cause
17. 4-1760-84-01E	Culver	10/03/83	02/03/84	123	No Cause
18. 4-0280-84-02E	Wiggins	10/05/83	01/30/84	117	No Cause
19. 4-3750-84-501	Hilton	11/04/83	01/26/84	83	No Cause
20. 4-3750-84-502	Hicks	01/06/84	08/08/84	215	Cause
21. 4-0280-84-503	Hufstetler	02/07/84	01/21/85	349	Cause
22. 4-0350-84-507	Lamb	03/26/84	05/15/84	50	No Cause
23. 5-0170-84-501	Kriescher	04/18/83	12/28/84	619	No Cause
24. 5-1260-83-001(405E)	Flener	06/08/83	08/23/84	442	No Cause
25. 5-1680-83-3(405E)	Smith	07/25/83	01/11/84	170	Cause
26. 5-1260-83-2(405E)	Carothers	08/19/83	08/23/84	369	No Cause
27. 5-4760-84-501	Jacobs	10/14/83	08/23/84	314	No Cause
28. 5-8120-84-501	Cady	10/17/83	02/17/84	122	No Cause
29. 5-3100-84-501	Schaff	10/28/83	08/08/84	285	No Cause
30. 5-1680-84-503	MacIntyre	11/30/83	08/02/84	246	No Cause
31. 5-6850-84-504	Cearlock	02/07/84	12/28/84	325	No Cause
32. 6-2320-84-501	Pilgrim	12/16/83	04/05/84	111	No Cause
33. 6-1730-84-509	Yingling	02/07/84	05/14/84	97	No Cause
34. 6-3550-84-503	Winkler	02/21/84	08/17/84	178	No Cause
35. 6-2320-84-009&502	Weise	02/27/84	08/10/84	165	No Cause
36. 6-1730-84-039&510	Anderson	03/02/84	04/30/84	59	No Cause
37. 6-1730-84-045&512	O'Conner	03/20/84	05/14/84	55	No Cause
38. 6-1730-84-064&514	Reinhart	05/02/84	08/07/84	97	No Cause
39. 6-1730-84-062&513	Thomas	05/07/84	07/26/84	80	No Cause
40. 7-5880-84-501	Wayman	09/09/83	05/17/84	251	No Cause
41. 7-4120-84-501	Nichols	12/27/83	11/30/84	339	No Cause
42. 7-2260-84-515	Dischler	07/30/84	11/05/84	97	No Cause
43. 8-0370-84-001E	Sandness	09/19/83	10/02/84	379	Cause
44. 9-0370-84-507	Rezac	05/09/84	12/07/84	212	No Cause
45. 9-1970-84-508	Kelly	07/05/84	12/07/84	155	No Cause